

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TAMARA IDELE WOLLANDER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,
Defendant.

No. 2:15-cv-00130-SAB

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are Plaintiff Tamara Idele Wollander's Motion for Summary Judgment, ECF No. 16, and Defendant Commissioner of the Social Security Administration's Motion for Summary Judgment, ECF No. 21. The motions were heard without oral argument. Plaintiff is represented by Dana C. Madsen, and Defendant is represented by Assistant United States Attorney Pamela DeRusha and Special Assistant United States Attorney Summer Stinson. For the reasons set forth below, the Court **grants** Defendant's motion, **denies** Plaintiff's motion, and **affirms** the ruling of the administrative law judge ("ALJ").

Jurisdiction

On August 30, 2011, Plaintiff filed an application for disability insurance benefits. Plaintiff alleges an onset date of January 2, 2007, for various injuries and maladies discussed in detail below.

Plaintiff's application was denied initially and on reconsideration. On

1 August 6, 2013, Plaintiff appeared and testified at a hearing held in Yakima,
 2 Washington, before an ALJ. The ALJ issued an unfavorable decision on
 3 September 10, 2013. Plaintiff timely requested review by the Appeals Council,
 4 which denied the request on March 17, 2015. The Appeals Council's denial of
 5 review makes the ALJ's decision the final decision of the Commissioner.

6 Plaintiff filed a timely appeal with the United States District Court for the
 7 Eastern District of Washington on May 14, 2015. The matter is before this Court
 8 under 42 U.S.C. § 405(g).

9

10 ***Sequential Evaluation Process***

11 The Social Security Act defines disability as the "inability to engage in any
 12 substantial gainful activity by reason of any medically determinable physical or
 13 mental impairment which can be expected to result in death or which has lasted or
 14 can be expected to last for a continuous period of not less than twelve months."
 15 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability
 16 only if their impairments are of such severity that the claimant is not only unable
 17 to do previous work, but cannot, considering claimant's age, education and work
 18 experiences, engage in any other substantial gainful work which exists in the
 19 national economy. 42 U.S.C. § 423(d)(2)(A).

20 The Commissioner has established a five-step sequential evaluation process
 21 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a)(4); *Bowen*
 22 *v. Yuckert*, 482 U.S. 137, 140-42 (1987).

23 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
 24 § 404.1520(b). Substantial gainful activity is work done for pay and requires
 25 compensation above the statutory minimum. 20 C.F.R. § 404.1574; *Keyes v.*
 26 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
 27 substantial activity, benefits are denied. 20 C.F.R. § 404.1571. If not, the ALJ
 28 proceeds to step two.

1 Step 2: Does the claimant have a medically-severe impairment or
2 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not
3 have a severe impairment or combination of impairments, the disability claim is
4 denied. A severe impairment is one that lasted or must be expected to last for at
5 least 12 months and must be proven through objective medical evidence. 20
6 C.F.R. § 404.1508-09. If the impairment is severe, the evaluation proceeds to the
7 third step.

8 Step 3: Does the claimant's impairment meet or equal one of the listed
9 impairments acknowledged by the Commissioner to be so severe as to preclude
10 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404 Subpt. P.
11 App. 1. If the impairment meets or equals one of the listed impairments, the
12 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one
13 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

14 Before considering Step 4, the ALJ must first determine the claimant's
15 residual functional capacity. 20 C.F.R. § 404.1520(e). An individual's residual
16 functional capacity is her ability to do physical and mental work activities on a
17 sustained basis despite limitations from her impairments.

18 Step 4: Does the impairment prevent the claimant from performing work she
19 has performed in the past? 20 C.F.R. § 404.1520(f). If the claimant is able to
20 perform her previous work, the claimant is not disabled. *Id.* If the claimant cannot
21 perform this work, the evaluation proceeds to the fifth and final step.

22 Step 5: Is the claimant able to perform other work in the national economy
23 in view of age, education, and work experience? 20 C.F.R. § 404.1520(g).

24 The initial burden of proof rests upon the claimant to establish a *prima facie*
25 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
26 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
27 mental impairment prevents her from engaging in her previous occupation. *Id.* At
28 step five, the burden shifts to the Commissioner to show that the claimant can

1 perform other substantial gainful activity. *Id.*

2

3 ***Standard of Review***

4 The Commissioner's determination will be set aside only when the ALJ's
 5 findings are based on legal error or are not supported by substantial evidence in
 6 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
 7 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
 8 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
 9 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
 10 evidence is "such relevant evidence as a reasonable mind might accept as adequate
 11 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
 12 ALJ's denial of benefits if the evidence is susceptible to more than one rational
 13 interpretation, one of which supports the decision of the administrative law judge.
 14 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court reviews the
 15 entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "If the evidence
 16 can support either outcome, the court may not substitute its judgment for that of
 17 the ALJ." *Matney*, 981 F.2d at 1019.

18 A decision supported by substantial evidence will be set aside if the proper
 19 legal standards were not applied in weighing the evidence and making the
 20 decision. *Brawner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
 21 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
 22 immaterial to the ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec.*
 23 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

24

25 ***Statement of Facts***

26 The facts have been presented in the administrative transcript, the ALJ's
 27 decision, and the briefs to this Court; only the most relevant facts are summarized
 28 here. Plaintiff is fifty-five years old, and possesses one year of college education

1 and some vocational training. She worked for twelve years as an ice skater. After a
2 head injury in 2002, Plaintiff alleges she has suffered vertigo, dizziness, and
3 nausea, and that these symptoms appear daily, all day. Plaintiff also alleges that no
4 medication has been successful in eliminating these symptoms, though inner ear
5 medication has provided some relief. Plaintiff also suffers from headaches, fatigue,
6 and neck spasms. Plaintiff attempted to work as a waitress, but was too sick to
7 work consistently. She alleges she requires twelve to fifteen hours rest after two
8 hours of work.

9 Dr. William Greene diagnosed Plaintiff with adjustment disorder and
10 borderline personality disorder after a psychological evaluation on September 24,
11 2004. He assigned a GAF score of 55 and determined that Plaintiff possessed
12 moderate limitations in her abilities to interact with colleagues, to interact with the
13 public, to respond to pressures in a normal work setting, and to maintain
14 appropriate behavior in a work setting.

15 During treatment in 2007, a clinic noted that Plaintiff bore low level
16 depression, general anxiety, chronic neck pain, and menopause, while prescribing
17 an antidepressant. Plaintiff underwent further treatment for her neck pain from
18 2008 to 2011. A neurologist, John Wurst, M.D., evaluated Plaintiff on
19 September 10, 2009. Dr. Wurst noted Plaintiff suffered from mood swings, panic
20 attacks, head and neck pain, nausea, and vomiting.

21 In January, 2010, Debra Brown, Ph.D., diagnosed Plaintiff with personality
22 disorder and found mild limitations for work. Plaintiff complained of depression
23 and suicide attempts from mid-2010 to late 2011. She was treated for a concussion
24 on November 5, 2011. From 2012 to 2013 Plaintiff complained of fatigue,
25 depression, knee pain, headaches, and vertigo. A February, 2013 x-ray showed
26 grade 1 anterolisthesis, moderate spondylitis, dextroscoliosis, and bony foraminal
27 narrowing secondary to uncovertebral, and facet degenerative joint disease in
28 various locations in Plaintiff's spine.

John Arnold, Ph.D., evaluated Plaintiff on April 4, 2013. He found a pain disorder, and major depressive and anxiety, assigning GAF Score of 55. He also found marked limitations in Plaintiff's ability to work within a schedule and complete a normal work week without interruptions. He found eight moderate limitations. Later that month, a physician's assistant opined that Plaintiff is limited to light work. Plaintiff continued to receive treatment in April 2013, where she complained of nausea, dizziness, and lightheadedness. She was diagnosed with benign paroxysmal positional vertigo; unspecified visual disturbance, headache, and hearing loss.

The ALJ's Findings

At step one, the ALJ found that Plaintiff was not currently engaged in substantial gainful activity. At step two, the ALJ found that Plaintiff's depression and anxiety with a no-otherwise-specified personality disorder were severe impairments. At step three, the ALJ found that Plaintiff did not meet any listing and thus did not prove that her impairments alone render her disabled. At step four, the ALJ found that Plaintiff is incapable of performing her past relevant work. At step five, the ALJ found, based on residual functional capacity, age, education, and work experience, that Plaintiff could perform other work found in significant numbers in the national economy, including fish cleaner, laundry worker, and dining room attendant.

Issues for Review

1. Whether Plaintiff is disabled under 20 C.F.R. Part 404, Subpart P, App'x 2, section 202.00, table No. 2?
2. Whether the ALJ improperly discredited Plaintiff's symptom claims?
3. Whether the ALJ failed to properly consider and weigh the medical opinion evidence?

Discussion

2 | 1. Whether Plaintiff is Disabled Under 20 C.F.R. Part 404, Subpart P, App 'x 2,
3 | section 202.00, Table No. 2.

4 For individuals of advanced age who cannot perform vocationally relevant
5 past work with a history of unskilled work experience or skills that are not readily
6 transferable to a significant range of semi-skilled or skilled work within a
7 claimant's functional capacity, limitations in vocational adaptability represented
8 by functional restriction to light work mandate a finding of disabled. 20 C.F.R.
9 Part 404, subpart P, App'x 2, section 202.00(c).

10 Plaintiff was 55 years old at the time of the hearing, and she is a high school
11 graduate. The vocational expert determined that Plaintiff had no skills that
12 transfer to light work. Based on the vocational expert's testimony and a
13 determination of Plaintiff's credibility, the ALJ determined Plaintiff is not limited
14 to light work. The question thus becomes whether Plaintiff is actually limited to
15 light work or less. This in turn revolves around the propriety of the ALJ's
16 determinations on Plaintiff's symptom testimony, as a finding of light work
17 depends on the crediting of that testimony.

18 As discussed below, the ALJ properly discredited Plaintiff's symptom
19 testimony. Thus the ALJ used the correct findings from the vocational expert
20 regarding Plaintiff's residual functional capacity. The decision to find that
21 Plaintiff does not satisfy section 202.00(c) was correct, and substantially
22 supported by the record.

24 | 2. Whether the ALJ Improperly Discredited Plaintiff's Symptom Claims.

25 ALJs must provide specific, clear, and convincing reasons to reject a
26 Plaintiff's symptom testimony if there is no evidence of malingering and the
27 Plaintiff has produced some objective medical evidence of the symptoms. *Burrell*
28 *v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014); *Smolen v. Chater*, 80 F.3d 1273,

1 1281-84 (9th Cir. 1996). A lack of affirmative medical evidence substantially
 2 affirming the symptom testimony, standing alone, is an insufficient reason to reject
 3 symptom testimony. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir.
 4 2006).

5 The Commissioner offers two reasons as clearly compelling the ALJ's
 6 decision to discount Plaintiff's symptom testimony. First, the ALJ concluded that
 7 Plaintiff's decision to not seek treatment following the prescription of treatment
 8 regarding her alleged impairments negated Plaintiff's credibility. A failure to do so
 9 can allow an ALJ to discredit a plaintiff's symptom testimony. *Fair v. Bowen*, 885
 10 F.2d 597, 603 (9th Cir. 1989). “[T]he individual's statements may be less credible
 11 if the level or frequency of treatment is inconsistent with the level of complaints,
 12 or if the medical reports or records show that the individual is not following the
 13 treatment as prescribed and there are no good reasons for this failure.” SSR 96-7p.

14 There are legitimate reasons, however, for failing to obtain treatment, for
 15 example, a violation of one's religious beliefs, unusually risky surgery, duplicative
 16 treatments, etc. 20 C.F.R. § 404.1530(c). More broadly, the Administration
 17 considers “physical, mental, and linguistic limitations” when considering whether
 18 there is a “good” or “acceptable” reason for failing to obtain treatment. *Id.*

19 The record demonstrates that Plaintiff is capable of making decisions about
 20 the medication she takes. She engaged in a discussion with her OB/GYN about
 21 what types of hormones to take, for example, asking for a prescription DHEA but
 22 refusing estrogen. TR. 513. At another visit, Plaintiff specifically told her treating
 23 professional that she did not want to discuss medication, and preferred
 24 homeopathy. TR 515. Plaintiff elected over-the-counter remedies, and did not
 25 purchase a muscle relaxant as prescribed. *Id.* At one point, Plaintiff indicates her
 26 symptoms are intermittent enough that she did not feel “prompted . . . to get
 27 medication.” TR 521. A provider stated that Plaintiff has “not been very compliant
 28 with recommendations to date.” TR 523.

1 A provider did mention that “[f]inances are part of the problem,” as well. *Id.*
 2 When the record indicates that refusing treatment is based off of an inability to
 3 pay, the refusal to treat symptoms cannot be used to discredit a claimant’s
 4 testimony. *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1296 (9th
 5 Cir. 1999) (plaintiff who testified extensively on inability to pay bore burden). It is
 6 unclear from the record how big a problem finances were for Plaintiff’s
 7 medication, or if the problem was recurring, as there is no other evidence or
 8 testimony on Plaintiff’s finances. This stray comment is weighed against the
 9 substantial evidence of the record, which indicates that Plaintiff explicitly made
 10 choices over her desire to take specific medication. There is also no medical
 11 evidence indicating that Plaintiff’s decisions on medication were related to her
 12 illnesses. In *Molina v. Astrue*, the Ninth Circuit upheld an ALJ’s determination
 13 that a plaintiff’s symptom testimony was incredible when there was no medical
 14 evidence that resistance to treatment was attributable to the mental impairment.
 15 674 F.3d 1104, 1114 (9th Cir. 2012). Rather, Plaintiff’s insistence on homeopathic
 16 remedies indicates that there was a personal preference involved.

17 When two reasonable, inconsistent interpretations are present and at issue,
 18 the Court must defer to the ALJ’s decision. *Consolo v. Fed. Maritime Comm’n*,
 19 388 U.S. 607, 620 (1966). The ALJ’s decision to discredit Plaintiff’s testimony on
 20 the basis that Plaintiff failed to seek treatment was based on clear, convincing
 21 evidence, and was permissible.

22 Second, the ALJ found that the objective medical evidence contradicted
 23 Plaintiff’s testimony. Minimal objective findings cannot allow an ALJ to discredit
 24 a plaintiff’s testimony standing alone; other reasons must be present. *Burch v.*
 25 *Barnhart*, 400 F.3d 676, 680-01 (9th Cir. 2005). As discussed above, though,
 26 another reason is present: Plaintiff’s refusal to subscribe to treatment. Thus,
 27 objective findings can undermine self-serving testimony. *Nyman v. Heckler*, 779
 28 F.2d 528, 531 (9th Cir. 1985).

1 The ALJ was well within her rights to hold that “three separate evaluators
2 found only that [Plaintiff] had a not-otherwise-specified personality disorder with
3 only mild to moderate social functioning limitations.” TR 21. This is sufficient
4 objective medical evidence (indeed, the weight of the evidence) to support the
5 ALJ’s findings on Plaintiff’s residual functional capacity. The ALJ also found that
6 the weight of the evidence established that Plaintiff was “repeatedly found to be
7 completely neurologically intact and unremarkable clinically.” TR 21.

8 The ALJ also specifically described the testimony found discredited. The
9 ALJ refers to Plaintiff’s “self-reported history of head injuries and subsequent
10 disequilibrium,” and recent reports on an inability to walk more than a few blocks.
11 TR 22. The ALJ properly considered Plaintiff’s testimony, and discounted its
12 credibility by substantial evidence.

13

14 *3. Whether the ALJ Failed to Properly Consider and Weigh the Medical Opinion*
15 *Evidence.*

16 Here the parties contest the ALJ’s findings and conclusions regarding
17 Dr. Arnold’s examination of Plaintiff. An examining physician’s opinion can only
18 be rejected for specific, legitimate reasons, supported by substantial evidence from
19 the record. *Andrews v. Shalala*, 53 F.3d 1035, 1943 (9th Cir. 1995). An
20 unreasonable examining opinion may be rejected in light of the record. *Morgan v.*
21 *Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th Cir. 1999).

22 The Court finds that the ALJ set out a detailed summary of the conflicting
23 medical evidence, made an interpretation, and properly rejected Dr. Arnold’s
24 opinion. *See Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). The ALJ
25 spends several pages detailing Plaintiff’s medical record, opinions of prior treating
26 and examining medical professionals, and Plaintiff’s allegations. TR 18-21. After
27 reviewing the record, the ALJ found that Dr. Arnold’s opinion was contradicted by
28 the weight of the record, which found no such limitations. The ALJ’s decision was

1 further buttressed by the conclusion that Dr. Arnold's opinion was based primarily
 2 on subjective complaints, where the record provides other reasons for discounting
 3 Plaintiff's testimony. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
 4 2001). The ALJ properly treated Dr. Arnold's opinion, and her conclusions are
 5 supported by substantial evidence.

6 Plaintiff is correct that it is improper to reject medical opinions for the
 7 reason that they were prepared for an application for state benefits. *Henderson v.*
 8 *Astrue*, 634 F. Supp. 2d 1182, 1191-92 (E.D. Wash. 2009). It was error for the
 9 ALJ to discount Dr. Arnold's opinion for that reason. TR 20. However, because
 10 the ALJ offered other specific and legitimate reasons for rejecting Dr. Arnold's
 11 opinion, which were based on substantial evidence, this error was harmless, and
 12 does not affect the outcome of the matter. *Stout v. Comm'r, Soc. Sec. Admin.*, 454
 13 F.3d 1050, 1055 (9th Cir. 2006).

14 For the reasons above, the Court **grants** Defendant's motion for summary
 15 judgment, **denies** Plaintiff's motion for summary judgment, and **affirms** the ALJ.

16 *Conclusion*

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Plaintiff's Motion for Summary Judgment, ECF No. 16, is **DENIED**.

19 2. Defendant's Motion for Summary Judgment, ECF No. 21, is

20 **GRANTED**.

21 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
 22 file this Order, provide copies to counsel, and close the file.

23 **DATED** this 27th day of June, 2016.



24
 25
 26
 27 Stanley A. Bastian

28
 Stanley A. Bastian
 United States District Judge